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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1946.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Petitioner,
vs.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Debtor,
Respondent.
No. 907.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Eighth Circuit.

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February 7, 1947.

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To the United States Circuit Court of Appeals for the Eighth Circuit.

OPINIONS BELOW.

The Findings of Fact, Conclusions of Law and Order of the United States District Court for the Eastern Division of the Eastern Judicial District of Missouri dismissing the claim of petitioner are unreported, and are found at page 575 of the Record herein. The opinion of the United States Circuit Court of Appeals for the Eighth Circuit affirming the decree below is also unreported as yet, and is found at page 589 of the Record.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 27, 1946 (Record page 589). Petition for rehearing was filed on December 9, 1946 (Record pages 601-607), and denied on December 16, 1946 (Record page 609). The petition for writ of certiorari was filed on January 17, 1947, and the jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 28 U. S. C. A. 347.

QUESTIONS PRESENTED.

The only question presented here is whether respondent, an intermediate carrier, is liable to petitioner, the initial carrier, for certain proportions of a joint freight charge claimed by petitioner for the transportation of crude petroleum over a through route from Wickett, Texas, to Whiting, Indiana. Petitioner's claim, which is grounded on the alleged violation by respondent of certain Mandatory Freight Accounting Rules, formulated by the Railroad Accounting Officers Association, was denied by the Interline Freight Accounting Arbitration Committee and by the Interline Freight Accounting Arbitration Appeal Committee. Petitioner challenges the award of the arbitrators, which both the district and the appellate courts hold to be conclusive of the issues and binding upon the parties.

All other questions formulated at pages 2 and 3 of the petition are either merely academic and speculative, or are otherwise wholly irrelevant to the case and to the issues decided by the courts below.

STATEMENT.

In the latter part of November, 1927, an oil field was developed near Wickett, Ward County, Texas, a station served by the Texas and Pacific Railway Company, hereinafter also referred to as petitioner. The crude oil was to be refined in Whiting, Indiana, and petitioner was, therefore, anxious to establish a through rate from Wickett to Whiting, with the concurrence of all the connecting railway lines (Record page 46 and Debtor's Exhibit 3, Record pages 416-417). Petitioner is the initial carrier and operates a line of railroad from Wickett to Big Sandy, Texas. The connecting carriers are: respondent and its Texas subsidiary, which operate lines of railroad from Big Sandy to St. Louis, Missouri, and East St. Louis, Illinois; and the Alton Railroad Company, the Chicago & Eastern Illinois Railroad Company, the Illinois Central Railroad Company, the Wabash Railroad Company, hereinafter called "the Illinois trunk lines", which operate lines of railroad from East St. Louis to Chicago junctions. The terminating carrier is the Elgin, Joliet & Eastern Railroad Company, which delivers the oil to the consignee, the Standard Oil Company, at Whiting, Indiana, and collects from it the freight charges (Stipulation of Facts, Record pages 31-32; 173).

The through rate was established at 37¢ per 100 pounds of crude oil, and was published in the Southwestern Lines' Tariff 125-C, Suppl. No. 3, issued on November 17, 1927, and effective on November 24, 1927 (Claimant's Exhibit 1, Record page 49). Respondent's Joint Division Sheet No. 9828, also effective on November 24, 1927, allowed 6.5¢ of the through rate of 37¢ to the lines north of East St. Louis, and the balance to the lines south of East St. Louis (Claimant's Exhibit 15, Record page 87). The division of

the balance of 30.5¢ was established at 21.35¢, or 70%, to petitioner, and 9.15¢, or 30%, to respondent and its Texas subsidiary, in spite of the disproportion of this division to the mileage haul (for a discussion of this disproportion, see Record page 277). No question arises concerning the aforesaid divisions under the 37¢ rate.

In March, 1928, petitioner began negotiations with respondent for the reduction of the rate to 32.5¢ (Claimant's Exhibit 18, Record page 96). Respondent consented to the publication of a through rate of 32.5¢ on condition that it would continue to receive for itself and its subsidiary the same division as before, namely, 9.1¢ (Claimant's Exhibit 19, Record page 96; Claimant's Exhibit 20, Record page 97; Stipulation of Facts, Record page 35—bottom), thus leaving 16.9¢ for petitioner. **The reduction of the rate was not submitted for concurrence to the Illinois lines,** whose 6.5¢ division was not affected thereby (Debtor's Exhibit 12-A, Record page 419; Debtor's Exhibit 12-B, Record page 420).

The new through rate of 32.5¢ from Wickett, Texas, to Whiting, Indiana, was published in respondent's Tariff No. 125-C, Suppl. No. 25, issued on August 9, 1928, and effective September 18, 1928 (Stipulation, Record page 36; Claimant's Exhibit 5, Record page 57).

Prior to September 18, 1928, on which date the 32.5¢ rate was to come into effect, the railway lines operating north of East St. Louis decided to raise their division from 6.5¢ to 10¢, effective August 15, 1928. Notice of this change was given by the Illinois trunk lines on August 8, 1928 (Claimant's Exhibit 26, Record page 120), and they refused to recede from their position "despite the vigorous protests of interested connecting carriers, including appellant [petitioner] and appellee [respondent]" (Opinion Court of Appeals, Record pages 591-592; Record pages

393-396; Debtor's Exhibit 21, Record page 426), which protests were also made to the Interstate Commerce Commission (Claimant's Exhibit 26-B, Record page 126; Claimant's Exhibit 26-A, Record page 125).

Since the Elgin, Joliet & Eastern, as terminating carrier, collected the freight charges on all of the petroleum, the Illinois trunk lines were able to enforce their demand for 10¢ by withholding that amount in settlements with prior carriers. Neither respondent nor petitioner ever received the division of the reduced rate which they insisted lawfully accrued to them.

The first oil movement from Wickett to Whiting involved in this suit, as to which the Illinois lines retained a division of 10¢, took place on October 19, 1928. Respondent had then the alternative either to charge the loss of revenue entirely upon petitioner or to apportion said loss between itself and petitioner.

Respondent's agreement with petitioner allowed it **an arbitrary** of 9.1¢ and not a percentage. Standing on the literal terms of said agreement, respondent could have retained its 9.1¢ and remitted the balance, namely 13.4¢ to petitioner (Record page 485, top). This is admitted by petitioner's accountant and witness Oliver (Record page 344, top). Instead of taking this position and in order to help petitioner, respondent converted the division of 9.1¢ to respondent and of 16.9¢ to petitioner, into percentages, resulting in 35% or 7.875¢ to respondent, and 65%, or 14.625¢, to petitioner (Stipulation, Record page 38). The difference between 14.625 per cwt. which petitioner received for the period in question and what it would have received had it been paid 16.9¢, amounts to $64,424.46, and is the amount which petitioner seeks to recover from respondent (Stipulation, Record page 38, bottom).

It should be noted that the shipments in question moved on what is known as "junction settlement", **which is a procedure for the collection of freight, and is authorized as an alternative method to "through billing"** by the Mandatory Freight Accounting Rules adopted and agreed to by the major railroads of the United States, including petitioner and respondent (Stipulation, Record page 32, No. 3 and page 37, bottom; Opinion Court of Appeals, Record page 593, bottom; page 594). In through billing, a through interline waybill, issued by the original carrier accompanies each shipment from origin to destination. This through waybill shows, among other things, the origin and destination of the shipment, consignor and consignee, route of movement, the applicable rate and and the information necessary to the apportionment of revenue between connecting carriers. As it is provided for by Mandatory Rule 118 (Record page 570), on shipments moving on **through billing**, freight charges collect, the destination carrier collects the charges from the consignee and accounts to prior carriers for their established divisions of the applicable rate (Stipulation, No. 3, Record pages 32-33; Opinion Court of Appeals, Record page 593).

On the **junction settlement** plan, which is the procedure involved in the present suit,* when the shipments of petitioner arrived at East St. Louis, respondent changed the headings of their waybills, which read "to Whiting, Indiana," to read "to East St. Louis, Illinois", and the headings reading "Consignee: Standard Oil Company of Indiana" to read "Consignee: Standard Oil Company of Indiana, Whiting, Indiana" (Stipulation, No. 5, Record pages 37-38). Thereafter, the Illinois trunk lines issued new waybills for the transportation from East St. Louis to Whiting.

* This suit concerns merely oil shipments moving on "junction settlement," and covers the period October 19, 1928, until December 27, 1929, when "through billing" was established (Stipulation, Record page 38; Record page 482).

This method permitted cash settlements to be made with the Illinois lines at the close of each week's business and enabled respondent and petitioner to receive their proportion of the revenue thirty days sooner than under through billing.

Respondent had been operating under the "junction settlement" plan since March 1, 1920, when it came out of federal control after the first World War, without capital or government guarantee (Record page 482). Petitioner, which was perfectly aware of this practice when it negotiated for and routed these shipments over respondent's line and accepted this procedure at the time upon respondent's avowed intention to maintain same (Debtor's Exhibit 34, Record page 494; Debtor's Exhibit 35-A, Record page 495; Debtor's Exhibit 36-A, Record page 497), is not justified now in charging that respondent "failed to follow the shipping instructions" of petitioner (Petition, page 5), as if by so doing respondent were committing wrong or failing to live up to contractual obligations.

Cash settlements between respondent and the Illinois trunk lines at East St. Louis were accomplished in the following manner as provided by the Mandatory Rules, 135 ff. (Record pages 570-572). Respondent on delivering a shipment to an Illinois trunk line presented that carrier with a bill for that part of the joint rate chargeable to the transportation from Wickett to East St. Louis. The Illinois line receiving the shipment advanced to respondent the charges accruing on the transportation from Wickett to East St. Louis, and respondent remitted to petitioner its division of the revenue (Record, page 405). Elgin, Joliet & Eastern collected from consignee at destination the full freight charge for the movement on the through rate from Wickett to Whiting (Record, page 173).

When the Illinois trunk lines started deducting 10 cents on junction settlements, this created a disputed division (Record page 486), and Freight Accounting Rule 143 (Record page 571) became applicable. This rule provides as follows:

> "The outbound carrier [Illinois lines] shall prepare junction Settlement Sheets * * *. In case of disputed divisions, the settlements made by the outbound carrier [Illinois lines] must be accepted by the inbound carrier [respondent] pending agreement by traffic departments of interested carriers" (Record pages 485-6).

This left no alternative to respondent, and shows the inaccuracy of petitioner's statement that respondent "acquiesced in the cut" (Petition, page 6).

Following the Procedure in Disagreements set forth in the Mandatory Rules 272 ff. (Record pages 572-574), petitioner instituted arbitration proceedings against respondent, alleging that respondent was liable to petitioner for violation of the Mandatory Rules. Both the Interline Freight Arbitration Committee and the Interline Freight Arbitration Appeal Committee found the issues in favor of respondent, held that it had not violated any of the Mandatory Interline Freight Accounting Rules and that petitioner had no cause of action against respondent (Record pages 265, 269, 273; on appeal, Record pages 226, 230, 233).

The findings of the arbitration committees were upheld both by the District (Record page 577) and by the Appellate Courts, which held that the award was final and binding upon the parties (Record pages 597-600).

ARGUMENT.

I. There Is no Conflict of Decisions Among the Circuits and the Decision Below Is Fully Supported by the Record.

1. This case involves no complicated issue. Petitioner charges that respondent is liable to it for the alleged violation of certain Mandatory Rules. This issue has been submitted by petitioner to two Freight Interline Arbitration Committees, which held that no mandatory rule had been violated by respondent, and that petitioner had no cause of action against respondent under the Rules. The award has been upheld by two federal courts, and petitioner now seeks certiorari to review their decisions, alleging the great importance of the questions involved here. Petitioner claims that "these questions are novel" (Petition page 12) and therefore is not alleging any conflict of decisions among circuit courts, but relies on the importance of the case as the ground for the granting of certiorari by this Court. Petitioner cites the case of **Mackay Radio and Telegraph Co. v. Radio Corp.** (1939), 306 U. S. 86, l. c. 89, as a case in which this Court granted certiorari solely "because of the nature and importance of the case" (Petition, page 13). Petitioner's quotation is not complete. This Court actually stated:

> "We granted certiorari, 305 U. S. 582, ante, 367, 59 S. Ct. 73, because of the nature and importance of the case, on a petition which urged as grounds for its allowance that validity and infringement of the Carter patent were in doubt and that, as petitioner is the only competitor of respondent in the business of world wide public radio communication, **further litigation, resulting in conflict of decision among circuits, was improbable.**" (Our emphasis.)

In the present case no contention is made or could be made by petitioner that conflict of decisions among circuits may not arise in the future. The Mandatory Rules are accepted and followed by the major railroads of the United States, and cases concerning the Rules may arise in any circuit of the United States.

2. Petitioner alleges that "the Court of Appeals has wholly misconceived the effect of the decisions of these Arbitration Committees" (Petition, page 13). The contrary is true. Petitioner argues that Rule 118 (Record page 570) requires the destination carrier to account for the proper revenue, and that by using the "junction settlement" respondent "made itself the collecting carrier of that portion of the joint rate accruing up to East St. Louis [and] therefore under the express terms of the Rule * * * it is 'responsible for the collection of the proper revenue, and for the proper reporting to all roads interested,' " irrespective of whether or not respondent collected such revenue (Petition, pages 29, 7, 12 and 19).

Petitioner made, unsuccessfully, the same contention before the Arbitrators as it is shown by the following passage of its brief before the Arbitration Committee:

> "R. A. O. A. Mandatory Rules 79 and 73 provide that statements of differences 'if correct shall be promptly embodied in a correction account by settling carrier'. The St. Louis and Southwestern Railway by its action in suppressing through billing became the 'settling carrier' and as such responsible under the rules for the adjustment of Texas and Pacific Railway statements of differences" (Record page 324, § 20).

Petitioner's present position is that the arbitrators did not absolve respondent from liability under the Mandatory Rules and that "they did not decide, as inadvertently

stated in the opinion below, that 'neither Rule 118 or 79 had any application on the question before them * * * and this without regard to ultimate decision of that dispute by the courts and by the Commission' (Record page 599)" (Petition, page 9).

The record shows beyond any shadow of a doubt that the contrary is true.

With specific reference to Rule 79, Arbitrator B. F. Russell said:

> "It is my opinion that there has been no violation of Mandatory Rule 79, 1928 Procedure, and Mandatory Rule 73, 1929 and subsequent Procedures" (Record pages 263-264).

Similarly, Appeal Arbitrator K. W. Price stated:

> "Question (2) * * * is its [respondent's] refusal to issue correction account covering the statements of differences attached a violation of Mandatory Rule 79 (1928-1929)?
>
> "Answer. No" (Record page 232).

Petitioner contends that the arbitrator's award

> "left open the further question of whether or not it was respondent's duty under established accounting rules and practices to collect this illegal exaction from the Illinois lines, and account to prior lines in accordance with their agreed divisions" (Petition, pages 13-14).

The record shows that such issue was discussed and decided by the arbitrators in the very language in which petitioner submitted it to them, as issue (e), namely:

> "In a case where a carrier makes delivery to a connection at a junction point in junction settlement and renders an incorrect interline settlement, because of the fact that the connection has arbitrarily retained excessive revenue, is the carrier making such incorrect

interline settlement responsible, under the rules, to carriers up to junction point for correct accounting and correct distribution of revenue, or must the carriers up to the junction point proceed against the carrier that has retained excessive revenue?" (Record pages 266 (e), 271 (e); on appeal: pages 224, 227-8.)

This is the same issue which was presented by petitioner's claim in the District Court (Record pages 7, bottom, and 8) and which is repeated here.

The arbitrators unanimously held that respondent was not liable to petitioner on such or any other of the issues presented, and that it had not violated any of the applicable Mandatory Rules.

Arbitrator B. F. Russell said:

> "It is my decision that there was no violation of mandatory interline freight accounting rules, and that the Texas and Pacific have no cause of action and must assume the arbitration fee of $15.00 in accordance with Rule 282, Jan. 1, 1936 Procedure" (Record page 265).

Arbitrator F. J. Tague, upon whose decision petitioner attempts to rely (see petition, page 9) actually concluded his decision with the following words:

> "It is my opinion that a violation of the Mandatory Interline Freight Accounting Rules has not been made out and that the Texas and Pacific Railway Company has no cause of action and must assume the arbitration fee * * *" (Record page 269).

Arbitrator E. N. Larson said:

> "Rule 139 of the 1929 procedure [same as Rule 143 of the 1928 procedure, Record page 571] provides that in case of disputed divisions, the original settlement made by the outbound carrier must be accepted, pending agreement by traffic departments. * * * In

> my opinion this controversy appears to be a question of disputed divisions between traffic departments, and the Texas and Pacific Railway Company is without cause of action and should assume the arbitration fee * * *" (Record page 273).

On appeal the same results were reached by the Appeal Arbitrators. Thus, H. V. Clemens, Appeal Arbitrator, said:

> "It is the decision of this Appeal Arbitrator that the Texas & Pacific Ry. Co. has no cause of action against the St. Louis Southwestern Ry. Co. under the mandatory rules of this association and the Texas & Pacific Ry. Co. should therefore assume the arbitration and appeal fees * * *" (Record page 230).

Similarly, K. W. Price, Appeal Arbitrator, concluded that petitioner

> "has no cause of action against the St. Louis Southwestern Railway Company under the mandatory rules of this Association" (Record page 233).

Appeal Arbitrator, G. W. Streicher, stated:

> "I concur in the decision reached by Arbitrators Price and Clemens that the Texas and Pacific Ry Co. has no cause of action and should assume the arbitration and appeal fees * * *" (Record page 226).

Petitioner does not claim that the arbitrators were wrong, and that their award should have been set aside or corrected by the courts. Petitioner merely says that the courts "wholly misconceived the effect of the decisions of these Arbitration Committees" (Petition, page 13). *The record reviewed above shows unmistakably that the six arbitrators, all railroad experts, found that respondent had not violated any one of the applicable Mandatory Rules.*

The findings of the District Court (Conclusion No. 3, Record page 577), and of the Circuit Court of Appeals

(Record pages 597-600) are irrefutably justified by the record.

3. Petitioner states that

> "The Arbitration Committee in this case did not by interpretation limit in any way the obligations placed on the waybill destination carrier by Rule 118 to collect the proper revenue."

This is true, but not in the sense intended by petitioner. The arbitrators did not limit, nor could they have limited, the liability of the Elgin, Joliet and Eastern Railroad Company as the terminating carrier under Rule 118, the common law and statutory law, for the collection of the freight and the apportionment of the proper revenue between the participating carriers. The Elgin, Joliet and Eastern Railroad Company collected the money which petitioner seeks, and, according to petitioner's contention, is illegally withheld. If so, there is nothing that prevents petitioner from asserting its claim against the Elgin, Joliet and Eastern Railroad Company.

This point was clearly made by Appeal Arbitrator Streicher, who stated:

> "The responsibility rests with the settling carrier [the Elgin, Joliet & Eastern R. Co.] to render a correct settlement to other interested lines, and this responsibility is not relieved because of the suppression of a through waybill at an intermediate point. This point is clearly established under provisions of Mandatory Rules Nos. 62 to 79, inclusive (1929 edition), and corresponding preceding and superceding rules" (Record page 225).

The same point was made by the Circuit Court of Appeals, which said:

> "If we concede for the argument that appellant is correct in its contention that the lawful rate on crude

> petroleum from Wickett to Whiting was 32.5 cents, in which the Illinois Trunk Lines were bound by contract with appellant and appellee to participate for a division of 6.5 cents, a question which we do not decide, it would seem that appellant's remedy was an action against the Elgin, Joliet & Eastern, the carrier which collected all freight charges, for the recovery of the lawful division of the established rate" (Record page 592).

Nor did the arbitrators express any opinion as to the action of the Illinois lines which were not even parties to the arbitration proceedings, in withholding a larger proportion of the revenue than originally agreed upon.

In the arbitration proceedings petitioner made the following contention:

> "The fact that Illinois Freight Association carriers arbitrarily retained revenue based upon the forcible imposition of an illegal division in no way mitigates in favor of the St. Louis and Southwestern Railway in its violation of the rules. The Texas and Pacific Railway can properly look only to the St. Louis and Southwestern Railway for redress under the mandatory rules. The St. Louis and Southwestern Railway has had ample opportunity to contest the illegal action of the Illinois lines and if it has failed to do so the disability is of its own creation [sic]. The St. Louis and Southwestern alone is answerable for the infraction of the rules here involved" (Record page 324).

As referred to above, the six arbitrators unanimously held that respondent had not violated any of the applicable Mandatory Rules, and that, under the Rules, respondent is not liable to petitioner for the action of the Illinois lines, upon which action the arbitrators refused to pass.

In its petition, Texas & Pacific quotes part of the decision of Arbitrator Price:

> "• • • I agree with the unanimous decision of the arbitrators, and it is the decision of this appeal arbitrator that while the Texas & Pacific Railway Company may have had the right to present the case to the Interstate Commerce Commission, or may have legal rights in court, it has no cause of action against the St. Louis Southwestern Railway Company under the mandatory rules of this Association. The Texas & Pacific Railway Company should, therefore, assume the arbitration and appeal fees in accordance with the requirements of Mandatory Rule 300, effective January 1, 1936" (Petition page 14).

The suggestion of the arbitrators that petitioner may have some rights which it may assert before the Interstate Commerce Commission or the courts does not even imply that such rights, if any, should be asserted against respondent, and said rights seem rather to be those which petitioner may assert against the Illinois lines which withheld the revenue claimed by petitioner, or the Elgin, Joliet & Eastern Railroad Company, the terminating carrier which collected the freight.

Similarly, the district court expressly declined to rule on the legality of the action of the Illinois trunk lines in exacting increased divisions of the 32.5 cent rate (Conclusion of Law No. 4, Record page 577). The Circuit Court of Appeals affirmed that decision and held that, irrespective of whether or not the division of the 32.5 cent rate in the proportions of 6.5 cents to the Illinois lines and 26 cents to petitioner and respondent, was a contract valid and binding upon the Illinois lines, **such contract neither expressly nor impliedly made respondent liable to petitioner for revenue not collected from the Illinois lines** (Record pages 597-598).

This point is not answered by petitioner, which discusses in detail why the Illinois lines had no right to retain a

larger revenue (Brief, pages 24-28), but fails to show why respondent herein should be liable for such action of the Illinois lines, except for respondent's alleged liability as a result of a claimed violation of the Mandatory Rules—in the face and in spite of the arbitrators' decision that no Mandatory Rule has been breached by respondent.

Specifically, Appeal Arbitrator G. W. Streicher pointed out in his decision that

> "The division sheet called for distribution of a specified sum of money and since the amount of revenue received was not sufficient for distribution strictly in accordance with the division sheet, it must follow that division sheet was not applicable and the settlement made by the StLSW Ry. Co. under Mandatory Rule 101 constituted a correct settlement. The StLSW Ry. Co. cannot be held in violation of Rule 73 (1929 edition) by its refusal to accept and account for statements of difference based on inapplicable divisions" (Record page 226).

The conclusion seems warranted that the authorities quoted by petitioner as supporting the proposition that "where the arbitrators refuse to consider a claim because they deem it not to be within their jurisdiction under the submission, such claim may properly be made the basis of an action" (Petition page 17), may be applicable to sustain an action against the Elgin, Joliet & Eastern Railroad Company or the Illinois lines, **but not against respondent,** which the arbitrators found not to be liable under any of the applicable Mandatory Rules.

II. The Decision Below, Which Held the Arbitrators' Award to Be Valid and Binding Upon the Parties, Is in Accord With the Weight of the Authorities and Petitioner Failed to Show How Said Decision Is Untenable and Probably in Conflict With the State Law as Yet Unannounced by the Supreme Court of Missouri.

Petitioner claims that the "trial Court's conclusion of law No. 3 (Record page 577) to the effect that the award of the Arbitration Committee adjudicated petitioner's rights under the rules is untenable, and the decision of the Court of Appeals affirming that ruling is likewise untenable" (Petition, pages 17-18). This contention amounts to a challenge of the binding character of the award of the arbitrators, which award petitioner sought in the first place.

The Circuit Court of Appeals held that

> "Whether the arbitration committees were right or wrong in their interpretation and application of the Mandatory Freight Accounting Rules is no concern of the courts. The controlling issue in the case having been submitted to arbitration and decided, the decision of the arbitrators is binding on the courts. **Wabash Railway Co. v. American Refrigerator Transit Co.**, 8 Cir. 7 F. 2d 335, 351; **McCullough et al. v. Clinch-Mitchell Construction Co.**, 8 Cir., 71 F. 2d 17, 22; **Richardson & Sons, Ltd. v. Hedger Transportation Corp.**, 2 Cir., 98 F. 2d 55, 57" (Record pages 599-600).

It is submitted that the above authorities are in point here, that they represent the applicable law, and that they fully support the holding of the appellate court.

In the **Wabash** case, cited above, cert. den. 270 U. S. 643, 70 L. Ed. 776, the Circuit Court for the Eighth Circuit said, loc. cit. page 351:

"Arbitration is favored by the courts. It is a mode of settling disputes less expensive and more expeditious than court procedure. In these days of long drawn out litigation and ever-increasing expense of trial, it may well become a special favorite of the law. Here were serious questions productive of litigation. The parties entered into an agreement that they should be considered and determined by an eminent and learned lawyer. He did so, and rendered his decision. The submission of the matter carried with it an implied agreement to be bound thereby. There is no claim made that the decision of the arbitrator was the result of fraud, partiality, misfeasance, or palpable mistake, resulting in an injustice to either party or that the arbitrator went beyond the scope of the questions submitted. If the statements of fact of the amended bill are to prevail, we see no reason why the parties to the arbitration are not bound as to the questions submitted to and determined by the arbitrator, and precluded from again agitating them. 2 Ruling Case Law, § 32, p. 386; Barnard v. Lancashire Ins. Co., 101 F. 36, 41 C. C. A. 170; Burchell v. Marsh et al., 17 How. 344, 15 L. Ed. 96; City of Omaha v. Omaha Water Co., 218 U. S. 180, 30 S. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084; Toledo S. S. Co. v. Zenith Transp. Co., 184 F. 391, 106 C. C. A. 501; McNees v. Ins. Co., 69 Mo. App. 232; Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116, 44 N. W. 1055; Morse on Arbitration and Award, p. 293. See also, extended note to Williams et al. v. Branning Manufacturing Co., 47 L. R. A. (N. S.) 337, where a mass of authorities is collected on the general subject.

"Every reasonable intendment is indulged in favor of such an award. Reedy v. Scott, 90 U. S. 352, 23 L. Ed. 109; Grant v. National Bank of Auburn (D. C.), 232 F. 201; Aetna Ins. Co. v. Hefferlin, 260 F. 695, 171 C. C. A. 433. **Such arbitrations are recognized by the laws of Missouri, the state where the agreement to arbitrate was made.** Ellison v. Weathers, 78 Mo. 115; Murphy v. Northern British & Mercantile Co., 61 Mo. App. 323." (Emphasis ours.)

In the **McCullough** case, cited above cert. den. 293 U. S. 582, 79 L. Ed. 678, the same court said, loc. cit. page 22:

> "Where an award has been made and the matter is how to make it effective, the law in the federal courts is as follows: Where there is national or state legislation providing for legal enforcement of an award, that will be done on the principle that such governs the remedy to enforce a recognized right. Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 44 S. Ct. 274, 68 L. Ed. 582. Where there is no such statute, the award will be given effect 'in any appropriate proceeding at law, or in equity.' Red Cross Line v. Atlantic Fruit Co., 264 U. S. 109, 121, 44 S. Ct. 274, 276, 68 L. Ed. 582, and see Bayne v. Morris, 1 Will. 97, 17 L. Ed. 495; Burchell v. Marsh, 17 How. 344, 15 L. Ed. 96; Karthans v. Ferrer, 1 Pet. 222, 7 L. Ed. 121; Davy v. Faro, 7 Crouch 171, 3 L. Ed. 305."

In the **Richardson** case, cited above, the Circuit Court of Appeals for the Second Circuit held as follows, loc. cit. page 57:

> "This Court is without power to amend or overrule merely because of disagreement with matters of law or facts determined by the arbitrators. The Hartbridge, 2 Cir., 62 Fed. 72. Their award is final and binding. Columbia v. Canca Co., 190 U. S. 524, 23 S. Ct. 704, 47 L. Ed. 1159; New York and Cumberland Ry. Co. v. Myers, 18 How. 246, 59 U. S. 246, 15 L. Ed. 380; Burchell v. Marsh, 17 How. 344, 58 U. S. 344, 15 L. Ed. 96; Georgia and F. R. Co. v. Brotherhood of Locomotive Engineers, 5 Cir., 217 F. 755; In re Wilkins, 169 N. Y. 494, 62 N. E. 575. There is no claim here of fraud, corruption or misconduct affecting the award."

Similarly, the Circuit Court of Appeals for the District of Columbia in **Campbell v. Campbell**, 44 App. D. C. 142 (1916), cert. den. 242 U. S. 642, 61 L. Ed. 542, stated that:

> "An award * * * valid on its face * * * until set aside in a proper proceeding * * * has the force of a judgment, and therefore **became res adjudicata as to all matters embraced in the submission * * * between the parties.**" (Emphasis ours.)

See, also, the Circuit Court of Appeals for the First Circuit in **Mutual Benefit Health & Acc. Ass'n v. United Cas. Co.** (1944), 142 F. (2d) 390, 393, cert. den. 323 U. S. 721.

The question is not a novel one for this Court.

In **Columbia v. Canca Co. et al.** (1903), 190 U. S. 524, 530, 47 L. Ed. 1159, 1164, Justice Holmes, speaking for this Court said:

> "It is for us to determine the scope of the Commission [of arbitration], whatever may have been its own finding with regard to its powers. But when its powers are established we are not called upon to revise any finding that could have been made without going beyond the line which we lay down."

Reference should also be made to the Federal Arbitration Act of 1925, 9 U. S. C. A. 11, which reads as follows:

> "In either of the following cases the United States Court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> "(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> "(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

"(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

"The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties. Feb. 12, 1925, c. 213, § 11, 43 Stat. 885."

It should be noted in this connection that petitioner does not even attempt to claim that its contention is within the permissible scope of the review authorized by the statute.

The same law is affirmed in the various jurisdictions of the Union. See the Supreme Court of Oregon in **Jacob v. Pacific Export Lumber Co.** (1931), 136 Or. 622, 297 P. 848, 856:

"Every matter which was decided or could have been presented to the arbitrator and decided in an award comes within the rule of res judicata. Hooper v. Pennick (102 Or. 382, 202 P. 743); First Nat. Bank v. Buckland, 130 Or. 364, 280 P. 331, 332."

The **Jacob** case was quoted with approval by the Supreme Court of Utah in **Grannopulos v. Pappas** (1932), 80 Utah 442, 15 P. (2d) 353, 356.

See also, in accord, the Supreme Court of Oklahoma in **Inglis v. Trickey et al.** (1935), 172 Okl. 144, 45 P. (2d) 135, 137, and authorities cited there.

Petitioner states "We submit that the opinion below creates uncertainty and confusion" (Petition, page 18). In view of the authorities quoted above, and of the binding character which should be conceded to the award, "uncertainty and confusion" would have arisen should the court below have set aside or disregarded the award of the Interline Freight Accounting Committees.

Petitioner alleges as a ground for the granting of certiorari that

> "The questions of local law involved in this case are important, and the Circuit Court of Appeals has decided them in a way that is untenable and therefore probably in conflict with the State law as yet unannounced by the Supreme Court of Missouri.
>
> • • • • • • •
>
> "* * * the Circuit Court of Appeals has decided the question of petitioner's legal right to hold respondent responsible for the collection and accounting to it of its agreed division out of the joint rate, and the question of the scope and effect of the decisions of the Arbitration Committees, in a way that is untenable, and in conflict with agreed upon accounting rules and practices, and in conflict with the weight of authority. It cannot be assumed that the Missouri Courts would so erroneously rule, and we say therefore as did this court in Ruhlin v. New York Life Insurance Company (Supra, l. c. 206), 'the decision below was "probably untenable" and therefore probably in conflict with the State law as yet unannounced by the highest court of the State' and certiorari should be granted." (Petition page 20.)

To complete the quotation of this court's decision in the **Ruhlin case**, 304 U. S. 202, the following passage should be added:

> "No such showing [of conflict with local law] was attempted by the petition" (Loc. cit. page 206).

It is submitted that **no such showing is made by Texas & Pacific** in its petition. As the index of the petition readily shows, not a single Missouri case, statute, textbook or law review article is cited by petitioner in support of its contention.

On the contrary, Missouri courts have decided cases involving arbitration awards, and have held that the arbi-

trators' decisions are final and binding upon the parties, except for cases of fraud and similar matters which are not involved in the present case.

In **Higgins-Wall-Dyer Co. v. City of St. Louis** (1932), 331 Mo. 454, 53 S. W. (2d) 864, 866, the Supreme Court of Missouri stated as follows:

> "'Neither by the contract of submission to arbitration nor by the statutes is the Court given power to review an award for errors of law. Unless there is some reservation in the contract submitting a controversy to arbitration the arbitrators are to pass upon the whole controversy, including the law and the facts and their decision as to each is final, binding and conclusive.'"

See also **Pope Const. Co. v. State Highway Commission** (1935), 337 Mo. 30, 84 S. W. (2d) 920, 921, in which the Supreme Court of Missouri, referring to an arbitration proceeding brought under the Missouri statutory provisions, said:

> "From a reading of the foregoing sections of the statute, it seems plain that the court is not authorized to examine or review the evidence or determine whether under the evidence the award is correct and that it cannot go into or adjudicate the merits of the controversy."

In **Dickens v. Luke** (1928), 2 S. W. (2d) 161, 162, the Springfield Court of Appeals said:

> "Plaintiff went into the arbitration with his eyes open and has received the fruits of the award. No fraud or partiality is shown, and we find no ground which would justify overturning the trial court's finding that plaintiff is precluded."

See also **Williams v. Chicago, S. F. & L. Ry. Co.** (1892), 112 Mo. 463, 20 S. W. 631, 637.

From the foregoing the conclusion seems warranted that the decision of the Circuit Court of Appeals is in accord with the weight of authority as well as with local law.

III. **No Important Question of Federal Law Is in Issue.**

Petitioner contends that

> "Questions 3 and 4 stated supra under the heading 'Questions Presented' involve an important question of Federal law as to whether or not under the Act to Regulate Commerce (49 U. S. C. A., Sec. 1, Par. 4 and Sec. 15, Par. 6), the Illinois Lines could legally establish a division of 10¢ per cwt. by the method they pursued in this case. Under point 1 of the argument in the supporting brief, we state the argument against the right to so establish a division of a joint rate. The opinion below refused to decide this question (R. 597, 598).
>
> "The exact question here presented has not been decided by this court. It involves an interpretation of the above sections and paragraphs of the Act to Regulate Commerce which is, of course, a Federal question. The correct decision of this question is a matter of great importance to all railroads whose rates and divisions are subject to Federal regulation and we submit certiorari should be granted" (Petition page 21).

The question is merely academic and it is not therefore properly before this Court. The Arbitrators, the District Court and the Circuit Court of Appeals have all unanimously held that the issue of the legality of the action of the Illinois lines in withholding a greater proportion of the revenue was not relevant and material to the decision of the present case, and that no liability could be fastened on respondent for the said action of the Illinois lines. The point has already been discussed in this brief, supra, and the fact that the Circuit Court of Appeals held the issue

immaterial (Record pages 598-599) does not seem to call for the exercise of the extraordinary remedial powers of certiorari which are invoked on the theory that the Circuit Court has "decided an important question of Federal law which has not been, but should be, settled by this Court" [Supreme Court Rule 38 (5) (b)].

Petitioner does not contend that under the common law or statutes, **it was the duty** of the respondent to sue the E. J. & E. It could not support that by any decisions, and it appears obviously untenable that one intermediate carrier should be obliged to sue for a proportion of the through rate of another carrier, from a terminal carrier, when the originating carrier has a well established legal right, both under the statutes and at common law, to sue and collect from such **terminating carrier who alone has collected its money and who alone holds it.** And this is true regardless of "junction settlements" which might have been used by the intermediate carriers. This is what equity would demand.

In the case of **Atlantic Coast Line v. B. & O. R. R.** (1935), 12 F. Supp. 711, the United States Court for the Seventh District said that it made no difference in the right to sue that the terminating carrier already paid a part of the rate to a connecting carrier. The Court said:

> "the defendant [terminating carrier] has not paid to the plaintiff [originating carrier] the fair division to which it is entitled. And this is true whether the defendant in fact has overpaid the R. F. & P. [intermediate carrier] or not. Even if it has, that would be no justification for withholding from plaintiff the amount to which it is fairly entitled. The plaintiff at no time assented to the division which was made by the defendant on its own initiative and responsibility. * * * For that reason the motion to dismiss the bill must be overruled" (l. c. p. 720).

In other words, the originating carrier may sue the terminating carrier regardless of payment to an intermediate carrier if the amount paid is not the fair percentage.

CONCLUSION.

The decisions below are correct; there is no conflict; and the case does not present any important question of federal law requiring further review by this Court. The petition for writ of certiorari should therefore be denied.

Respectfully submitted,

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February 7, 1947.